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No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1974

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–23A) is reported at 495 F. 2d 261. The opinion of the district court (Pet. App. C, pp. 26A–38A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D, pp. 39A–40A) was entered on March 29, 1974. A timely petition for rehearing was denied on May 29, 1974 (Pet. App. B, pp. 24A–25A). On August 20, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 26, 1974, and on September 16, 1974, he further extended the time to October 26, 1974. The petition was filed on

October 25, 1974 and was granted on February 18, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exemption 6 of the Freedom of Information Act, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," covers all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."

2. Whether exemption 6 bars disclosure of summaries of proceedings against cadets at the Air Force Academy accused of violation of the Honor and Ethics Codes, because such disclosure would constitute "a clearly unwarranted invasion of personal privacy."

3. Whether the exemption from disclosure in exemption 2 of the Freedom of Information Act for matters "related solely to the internal personnel rules and practices of an agency" is inapplicable, as the court of appeals held, if the material has "a substantial potential for public interest outside the Government."

STATUTE INVOLVED

The Freedom of Information Act, as amended, Pub. L. 93–502, 88 Stat. 1561, 5 U.S.C. 552, provides in pertinent part:

> Section 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *

> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.[1]
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> * * * * *

STATEMENT

This is a suit under the Freedom of Information Act, 5 U.S.C. 552, to compel disclosure of summaries of Air Force Academy Honor and Ethics Code cases. The Air Force Academy Honor Code states: "We will

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[1] This section was amended by the 1974 Amendments to the FOI Act, Pub. L. 93–502, 88 Stat. 1561. Prior to the amendments, Section 552(a)(3) read, in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *"

The amendments did not affect exemptions 2 and 6 of the Act, 5 U.S.C. 552(b) (2) and (6).

not lie, steal, or cheat, nor tolerate among us anyone who does." The Code is administered through a Cadet Honor Committee, composed of cadets, which conducts hearings for cadets accused of Honor Code violations. The Honor Committee's "Procedures for Honor Hearing" state: "* * * all matters discussed at the hearing are confidential and should not be discussed * * * with anyone other than an Honor Representative [a cadet selected by his fellows to administer the Code]." (App. 47, 83, 97, 100).[2]

The Cadet Honor Committee summarizes the significant facts of each case in detailed written case summaries which are distributed "for official use only" within the Academy to Honor Representatives and others charged with administration of the Code, on a "need to know" basis. Similarly, the Ethics Committee at the Academy, composed of cadets, administers the Ethics Code and conducts Ethics Code hearings for cadets which are similarly confidential. The Ethics Code case summaries are also distributed solely within the Academy "for official use only" (App. 28, 96–97, 156–157, 163–164, 174–175, 177, 187, 189–190).

Respondents were law students seeking disclosure of the case summaries, with the names of cadets deleted, to use "in the form of footnotes for illustration" in a law review note on disciplinary procedures at the military academies (App. 160, 164). The case summaries will also be maintained for public inspection in the library of the New York University Law School (App. 195). During lengthy interviews with respondent Rose, Academy officials gave him the

[2] "App." refers to the appendix lodged with the Court

Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures, and various other materials explaining the Honor and Ethics Codes (App. 155, 162, 172). They denied access to the case summaries, however, because the summaries are so detailed that, even with the names deleted, "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given" and "[t]here is no way of determining just how these facts will be or could be used" (App. 21, 157).

Respondents then filed the present action in the United States District Court for the Southern District of New York seeking to compel disclosure of the case summaries pursuant to the Freedom of Information Act. The Superintendent of the Air Force Academy, the Commandant of Cadets and the Commandant's Executive for Honor and Ethics each filed in the district court affidavits stating that cadets who had been the subjects of Code hearings could be damaged for the balance of their lives if a reader connected the incident described in the case summary with a particular cadet (App. 21, 157, 181, 186). See Rose, *A Prayer for Relief,* p. 106, n. 631 (New York University Law School, 1973).

The district court held that the case summaries are exempt from mandatory disclosure under exemption 2 of the Act, 5 U.S.C. 552(b)(2), as "matters that are * * * related solely to the internal personnel rules and practices of an agency" (Pet. App. C, pp. 33A–35A). On appeal, petitioners, then appellees, urged affirmance on that ground, and also reiterated their contention, rejected by the district court (Pet. App.

C, pp. 29A–32A), that the case summaries are exempt from disclosure under exemption 6 of the Act, 5 U.S.C. 552(b)(6), as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

A divided court of appeals reversed. The court held that the case summaries are not covered by exemption 2 because they "have a substantial potential for public interest outside the Government" and "have great impact on the lives and careers of subject cadets" and therefore are different "from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency'" (Pet. App. A, pp. 7A–8A; emphasis added).

The court recognized that the case summaries are "personnel" or "similar" files within the meaning of exemption 6, and that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (Pet. App. A, pp. 10A–13A). But the court held that exemption 6 was inapplicable to the case summaries with "personal references and all other identifying information" deleted in view of "the statutory goal of Exemption Six: a workable compromise between individual rights 'and the preservation of public rights to government information'" (Pet. App. A, pp. 14A–15A).

Since the appellees had failed to "carry th[e] burden" of establishing the applicability of exemption 6,

the court required the Academy to "produce the summaries themselves in court" for *in camera* inspection. The court stated that it is "highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient * * * to safeguard affected persons in their legitimate claims of privacy" (Pet. App. A, p. 14A).[3]

Judge Moore dissented on the ground that the majority decision overrode the specific prohibition of exemption 6 by allowing respondents to "pry into and seek to disclose the former transgressions of Air Force cadets," at a "time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched" (Pet. App. A, pp. 18A–19A). Judge Moore also noted: "Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation" (Pet. App. A, p. 22A).

SUMMARY OF ARGUMENT

The court of appeals' interpretation of exemptions 6 and 2 of the Freedom of Information Act seriously jeopardizes the privacy of citizens by requiring the disclosure of highly damaging and derogatory material in government personnel files. The decision

[3] The court also stated that courts retain broad equitable power to decline to order disclosure which would damage the public interest, at least in "an exceptional case," but held that the issue "is not a substantial one" in the context of exemption 6 "since the language of the exemption requires a court to exercise a large measure of discretion" (Pet. App. A, p. 17A).

requires disclosure on the incorrect assumption that, by excising names and other identifying information, the particular individuals involved in disciplinary proceedings cannot be identified.

1. The decision of the court of appeals defeats the explicit intention of Congress, in enacting exemption 6, completely to exempt government personnel files from disclosure under the Act. The reference in that exemption to disclosure that would "constitute a clearly unwarranted invasion of personal privacy" qualifies disclosure only of "similar" files but not of "personnel and medical files." The Honor and Ethics Code summaries involved in this case are "personnel" files and as such are exempt from disclosure. Moreover, even if exemption 6 does require a showing that disclosure of personnel files would also constitute a clearly unwarranted invasion of personal privacy, the kind of files sought in this case, containing as they indisputedly do intimate details of a highly personal nature, are within the purview of exemption 6 and need not be disclosed under the Act.

2. The court of appeals also found that if a document has substantial potential for public interest outside the government, it does not relate solely to internal personnel rules and practices of an agency and accordingly is not exempted from disclosure under exemption 2. Such an interpretation vitiates exemption 2. The very fact that a suit is brought to disclose a document indicates that there is potential for public interest in the document, but public interest does not preclude the document from relating solely to internal personnel rules and practices of an agency.

ARGUMENT

I

EXEMPTION 6 OF THE FREEDOM OF INFORMATION ACT EXEMPTS ALL PERSONNEL FILES, NOT MERELY THOSE WHOSE DISCLOSURE CONSTITUTES "A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY"

1. Exemption 6 of the Freedom of Information Act excepts from the Act's disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals read this exemption as covering only those personnel files whose disclosures would constitute "a clearly unwarranted invasion of personal privacy" (Pet. App. A, pp. 10A, 12A–13A). We submit, however, that the determination whether disclosure would constitute such an invasion of personal privacy is required only in the case of "similar files," and that once it is determined that particular files are "personnel" or "medical," the judicial inquiry is at an end.

In other words, in exemption 6 Congress itself made the determination that disclosure of "personnel and medical files" would constitute an impermissible invasion of personal privacy. It is only when a file or document is not a personnel or medical file but rather is a file "similar" to such a file that the *additional* showing must be made that disclosure of such a file would constitute a "clearly unwarranted invasion of personal privacy." As the Fourth Circuit recognized (*Robles* v. *Environmental Protection Agency,* 484 F. 2d 843, 846): "'Similar files,' in order to qualify under the exemption, must fit the *additional* qual-

ifications set forth in the exemption, *i.e.*, they must contain information 'the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' " (emphasis added).

The summaries of the Honor and Ethics Code violations involved in this case are "personnel" files. They relate to conduct by the cadets at the Academy, and are the basis for disciplinary action such as involuntary resignation or expulsion. They are just as much a part of a cadet's "personnel" file as the records of his academic and military performance. As such, they are protected from disclosure by exemption 6.

Congress did not intend the courts, before applying exemption 6 to personnel files, to determine whether disclosure of those files would constitute "a clearly unwarranted invasion of personal privacy"—an inquiry which, the court of appeals recognized, "involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts" (Pet. App. A, p. 10A).

2. The language of exemption 6 does not compel the court of appeals' interpretation of it. To the contrary, the more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material that should be protected against disclosure and that other files also *may* contain such material. It therefore provided for confidential treatment of all personnel and medical files, and for such treatment of other files that share the relevant characteristic of personnel and medical

files—that is, files "whose disclosure would constitute a clearly unwarranted invasion of personal privacy." Congress certainly did not intend to subject the millions of government personnel and medical files to the balancing standards and editing procedures applied in this case, as a condition to maintaining their confidential character.

Indeed, in the case of medical files, Congress was legislating in the light of the well-established privilege covering the confidentiality of the doctor-patient relationship. If exemption 6 covers only those medical files that meet the "clearly unwarranted invasion" standard for nondisclosure, many doctor-patient communications that hitherto have been confidential would be subject to disclosure. Congress did not intend exemption 6 to have that effect. But if the invasion of privacy requirement that the court of appeals read into the personnel files portion of exemption 6 is correct, it also would cover the medical files portion of that provision.

Moreover, the structure of exemption 6 parallels that of exemption 4 in listing first a wholly exempt group of matters and, secondarily, a general category of matter which is exempt only if it satisfies certain criteria. Thus, exemption 4 speaks of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." "Trade secrets" are exempt without qualification; other "information" is exempt only if it meets specified conditions. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, pp. 32–34 (1967). Similarly, under

exemption 6, "personnel and medical files" are exempt without qualification; "similar files" are exempt only if their disclosure "would constitute a clearly unwarranted invasion of personal privacy."

3. The legislative history of exemption 6 confirms that Congress intended to provide complete protection for the confidentiality of personnel and medical files without requiring the government also to show in each case that disclosure of material in those files "would constitute a *clearly unwarranted* invasion of personal privacy" (emphasis added). The report of the House Committee stated that exemption 6 excluded from disclosure "those kinds of files the disclosure of which *might* harm the individual. The exemption is also intended to cover detailed Government records on an individual which *can* be identified as applying to that individual * * * " (emphasis added). H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 11 (1966). Congress did not intend that exemption 6 would expose the "vast amounts of personal data" collected by the government, "usually for limited purposes," such as "health, welfare, and selective service records [which] are highly personal to the person involved * * *." S. Rep. No. 813, 89th Cong., 1st Sess., p. 9 (1965). As the Senate Committee stated:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, *such as medical and personnel records* [*id.* at 3; emphasis added].[4]

[4] Upon signing the Freedom of Information Act into law, President Johnson declared: "Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure" (2 Weekly Compilation of Presidential Documents 895 (July 11, 1966)). Similarly, the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) pointed out that exemption 6 "is intended to exclude from the disclosure requirements *all personnel and medical files*, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invation of the privacy of any person * * * to whom the information pertains" (p. 36; emphasis added).

4. One reason that Congress created a blanket exemption for personnel and medical files is the sheer magnitude of such files. Thus the Senate Report noted the wide variety of government personnel files, including those of the "Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc." and reported "a consensus that these files should not be opened to the public" (S. Rep. No. 813, *supra,* at 9).

The number of government personnel and medical files maintained by agencies such as the Civil Service Commission, the Veterans' Administration, and the Selective Service System is staggering and the information contained in such files is sometimes very detailed, very personal, and potentially very embarrassing. The Civil Service Commission has advised that it maintains more than 89 million personnel files. These include: 68 million official personnel folders on former federal employees; 15 million files relating to employee claims for retirement, insurance and health benefits which contain information on salaries, life and health insurance, designation of beneficiaries and medical histories; 2.6 million files containing the results of FBI loyalty investigations; and 2.25 million

files containing information relating to communist and subversive activities of individuals.

The Veterans' Administration has advised that it maintains approximately 35 million files. These include: 24 million records of all veterans', dependents' and survivors' claims for compensation, pension, education, retirement pay and medical or other benefits; 5 million applications for insurance with accompanying correspondence; and 6.5 million medical records of patients who have been given care and treatment by the VA. The Selective Service System states that it currently has approximately 15 million files of individuals who have registered with the System. These files contain the name, address, general physical description, and occupation of the registrant as well as the addresses of two persons who will always know his whereabouts. The Selective Service System also has 3.2 million files containing claims for hardship or conscientious objector status and 3.4 million reports of physical evaminations.

It is not realistic to think, indeed it is not conceivable, that Congress intended to permit such a broad scale disclosure of personnel and medical files or that Congress even expected that such files be subjected one by one to a judicial determination whether their disclosure would constitute a clearly unwarranted invasion of personal privacy, or to *in camera* inspection and a redacting process.[5]

[5] The recent amendments to the Act (Pub. L. 93-502, 88 Stat. 1561, 1562, 1564) relating to segregation of non-exempt portions of records and to *in camera* inspection by district courts do not change the nature of exemption 6 or alter the absolute exemption from

The confidentiality of some of the above kinds of personnel and medical files has hithertofore been con-

compelled disclosure for personnel files which that exemption confers. The 1974 amendments added to 5 U.S.C. 552(b) the provision:

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

This "segregable records" provision, as its legislative history illustrates, was simply a statutory recognition of the procedures previously followed by the courts in segregating exempt from non-exempt portions of documents; it was not intended to amend any substantive exemption in the Act (120 Cong. Rec. S9313, S9318 (daily ed., May 30, 1974) (remarks of Senators Kennedy and Hruska)). As Senator Hruska explained (120 Cong. Rec. S9318 (daily ed., May 30, 1974)):

"The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. This provision reflects existing law, but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7."

The very terms of the new "segregable records" provision require deletion of exempt portions of the records. Since personnel files are themselves wholly exempt, they are not subject to segregation and even partial compelled disclosure under the Act.

Similarly, the new provision authorizing *in camera* inspection of requested records, Pub. L. 93-502, 88 Stat. 1561, 1562 (5 U.S.C. 552(a)(4)(B)), has no application to this case. That provision provides:

"* * * the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section * * *."

As already noted, the 1974 amendments do not substantively amend exemption 6 and if, as we urge, the exemption covers

ferred by various statutes or agency regulations.[6] But this does not mean that such files are not also protected from compelled disclosure by exemption 6. Indeed, one of the stated purposes of enacting exemption 6 was to obviate the need for a multitude of separate statutes to protect personnel and medical files. As the House Report on S. 1160, the bill which became the Freedom of Information Act, explained:

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record.[7]

In short, it is sufficient to invoke the exemption to show that a file, such as an Honor Code case summary, is a government personnel file; no further showing, editing, or *in camera* inspection is necessary.

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all personnel files, there is no occasion when dealing with such files to conduct the *in camera* inspection which the amendments authorize.

[6] For example, 32 C.F.R. Part. 1608 protects the confidentiality of information submitted by registrants to the Selective Service System. 38 U.S.C. 3301 and 38 C.F.R. 1.500–1.527 require confidential treatment of information relating to claims made to the Veterans' Administration. Cf. *Dow* v. *Robertson*, No. 74–450, argued April 15, 1975.

[7] H.R. Rep. No. 1497, *supra*, at 11.

II

IN ANY EVENT, THE DISCLOSURE OF THESE FILES WOULD CONSTITUTE "A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY"

If, contrary to our submission, the "clearly unwarranted invasion of personal privacy" requirement in exemption 6 applies to Honor and Ethics Code case summaries, the court of appeals nevertheless improperly required an *in camera* district court examination of the summaries to eliminate information that could result in identifying the cadets involved in the violations. The court of appeals' own analysis of the summaries shows that exemption 6 bars their disclosure even if the invasion of privacy criterion is imported. Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 81, 93–94.

The court of appeals believed that the harm that might result to the cadets from disclosure of the summaries could be minimized or eliminated by the *in camera* screening and excision it ordered. It nevertheless recognized that even this procedure might not protect the cadets from disclosure of their involvement in the Code violations—a disclosure that could have a serious adverse impact upon their subsequent careers, both in the military and elsewhere.

Speaking of summaries "with names omitted," the court stated: "[I]dentification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (Pet. App. A, p. 12A, 13A). The court noted that

those best situated to identify the subject of a nameless summary would be former cadets and Academy officials who "had access to these records originally" (Pet. App. A, p. 11A). However, the court also recognized that—

> [a] senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection. [Pet. App. A, p. 12A.]

Similarly, the court recognized:

> [P]ublication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty. [Pet. App. A, p. 12A.]

The ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports and files is strikingly illustrated by the recent case involving government files relating to Ezra Pound. A researcher, who had received data concerning Ezra Pound from the files of the FBI, identified a number of individuals who had furnished data on Pound to the Bureau, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished to the researcher in an attempt to "redact" the files to avoid such identification (see The New York Times, Book Review Section, p. 47, April 21, 1974; 120 Cong. Rec. S9333–S9334 (daily ed., May 30, 1974)).

The reason that such "editing" of the data is likely to be ineffective in preserving the anonymity of the people involved is that where the entire group itself is relatively small, even a few details may enable people familiar with the subject to identify the particular individuals involved. The number of cadets in the Air Force Academy at any one time is sufficiently small that the Honor and Ethics Code summaries, even with significant deletions, are likely to be sufficiently suggestive and informative to enable those familiar with the Academy to draw accurate inferences concerning the identity of the cadets involved in the particular violations described.

Congress in exemption 6 did not intend to authorize the courts to require disclosure of files of the kind involved in this case on the basis of excision of "personal references and all other identifying information" (Pet. App. A, p. 15A) in the files—a process which, by its very nature, cannot adequately protect the confidentiality that Congress wished to ensure by exemption 6.[8]

[8] If the redaction ordered by the court of appeals cannot adequately protect the cadets' privacy, the *in camera* inspection ordered to further that process is not appropriate, and the 1974 Amendment authorizing *in camera* inspection does nothing to

The court of appeals stated (Pet. App. A, p. 15A) that if the deletion of "personal references and all other identifying information" is, "in the opinion of the district judge," "not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants." This statement is inconsistent with the court's own view that it is "highly likely" that such deletion would be adequate to accomplish that objective—a view reflecting the court's belief that exemption 6 constitutes "a workable compromise between individual rights 'and the preservation of public rights to government information' " (Pet. App. A, pp. 14A–15A). Despite the court of appeals' suggestion that the district court ultimately might decline to disclose some of the summaries, the practical effect of its decision will be to permit disclosure of material that Congress intended to keep confidential pursuant to procedures that Congress did not contemplate.

The probable result of the court of appeals' decision in this case would be a serious violation of the right of privacy of a large number of cadets at the Air Force Academy.[9] This case, therefore, implicates an

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bolster the court of appeals' disposition of the case (see n. 5, *supra*, pp. 14–16).

[9] Compare *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F. 2d 73 (C.A.D.C.), where the court of appeals, in dealing with the category of "similar" files, instructed the district court on remand to "reconsider and re-evaluate" a government affidavit which contended that the files contained personal information so detailed that the privacy of the named individuals could not be adequately protected by a deletion process (*id.* at 78). In contrast to the Second Circuit's view that exemption 6 must be given a "narrow" construction (Pet. App. A, pp. 5A, 9A), the District of Columbia Circuit declared that exemption 6 is "phrased broadly to protect individuals from a wide range of embarrassing disclosures" (498 F. 2d at 77). The files involved there were statements of and records concerning persons who had allegedly been discriminated against by the Farmers Home Administration.

additional factor beyond the usual Freedom of Information Act case, in which the competing considerations are the public interest (1) in obtaining information about the government and (2) in avoiding disclosure that may interfere with the proper functioning of government. In exemption 6 of the Freedom of Information Act, Congress expressly undertook to protect the right of privacy. As the Report of the Senate Committee stated (S. Rep. No. 813, *supra* at 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important right of privacy with respect of certain information in Government files, such as medical and personnel records.[10]

The instant case is among the most compelling for protecting the individual's interest in privacy. Public disclosure, even accompanied by an admittedly imperfect editing process, threatens the persons who were

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[10] See also the congressional findings in the recently-enacted Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a note):

"Sec. 2. (a) The Congress finds that—

"(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

* * * * *

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States * * *.

* * * * *

the subjects of Honor and Ethics Code hearings with lifelong disgrace at a time when, as Judge Moore stated in his dissent, "the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched * * *" (Pet. App. A, p. 18A).

III

THE CASE SUMMARIES ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 2 OF THE ACT, AS MATTERS "RELATED SOLELY TO THE INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY"

Exemption 2 excepts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The Honor and Ethics Code case summaries involve the "internal personnel rules and practices" of the Air Force Academy (see *infra*, p. 23). The court of appeals ruled, however, that this exemption was inapplicable here because the case summaries "have a substantial potential for public interest outside the Government" (Pet. App. A, p. 8A). The court's apparent rationale was that, because of the "potential for public interest," the summaries do not relate "solely" to internal personnel rules and practices (*ibid.*). This is a misinterpretation of exemption 2, which reads into the exemption a qualification that Congress did not make and that would seriously weaken it.

The fact that particular government documents relating to internal personnel rules and practices may "have a substantial potential for public interest outside the Government" does not change their character as matters that relate "solely" to those rules and

practices. There frequently will be substantial public interest in matters that relate "solely" to internal agency personnel rules and practices. The standard Congress promulgated to protect the confidentiality of those rules and practices, however, is whether the matters sought to be disclosed relate "solely" to them and not whether there may be a substantial public interest outside the government with respect to them.[11]

The present case illustrates this distinction. The Honor and Ethics Code summaries are written by cadets for use by other cadets and Academy officials in connection with the operation and administration of the Academy and the maintenance of the voluntary Honor and Ethics Codes. The Codes provide the standards by which the cadets guide their own conduct while at the Academy. The Code hearings are confidential—attended solely by cadets and appropriate Academy officials.

The case summaries thus relate "solely to the internal personnel rules and practices" of the Academy. They involve the discipline, training and fitness of cadets. They are administered and enforced on a confidential basis by the cadets themselves and exist wholly apart from the formal system of courts martial and the Uniform Code of Military Justice (App. 13–15, 80–81, 83, 96–97, 110, 156–157, 174–175, 177).

In enacting exemption 2, Congress intended to

[11] This analysis equally applies to the court of appeals' reasoning that the case summaries do not relate "solely" to internal personnel rules and practices for the additional reason that they "have great impact on the lives and careers of subject cadets" (Pet. App. A, p. 8A).

avoid the substantial prejudice to the effective performance of agency functions which disclosure of internal personnel rules and practices would cause. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, *supra* at 30–31. This rationale of exemption 2 is especially applicable to personnel measures undertaken by the armed services for the discipline and training of its military personnel. Cf. *Parker* v. *Levy*, 417 U.S. 733, 743, 744; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896. Here, if the confidentiality of the Honor and Ethics hearings were broken through release of case summaries to the general public, both the Honor and Ethics Code systems and, to an extent, the effective operation of the Academy would be impaired.

To take one example, the option of returning a cadet who has been voted guilty to the Cadet Wing (the discretion option) would be seriously weakened. As Brigadier General Galligan explained, the use of discretion is designed to permit a cadet to return to the Cadet Wing "unblemished to continue his education." "The man who has learned his life-long lesson of honor can be a great asset to the Wing and to the Air Force. His retention is therefore not only justified; it is desired." But "[t]o permit release of case summaries or write-ups of either Honor or Ethics incidents even though not notorious could reach his home town or his friends and become an indelible blot on his future" (App. 186).

Perhaps most importantly, public availability of the materials sought by respondents could impair the

effective functioning of the toleration clause ("We will not * * * tolerate among us anyone who does [lie, steal, or cheat]" (App. 47)), which is the "backbone of the Cadet Honor Code" (App. 59). As Brigadier General Galligan stated, "Each cadet fully understands the spirit behind the toleration clause, as well as the obligation it creates and the method of reporting a suspected honor violation" (App. 186). But the resolve of cadets to live up to the standards by the toleration clause would be seriously weakened if cadets no longer had the absolute assurance that their reports would be completely confidential.

The character of the Code summaries as matters that relate solely to the Academy's internal personnel rules and practices is not altered by the fact that there may be substantial public interest in the way the Codes operate. Such public interest also exists with respect to other types of government internal procedures that the legislative history of exemption 2 shows Congress specifically intended it to cover, such as the Treasury Department's instructions for the proper conduct of a "stakeout" or the manuals instructing auditors of government contractors how to detect irregularities.[12] Such public interest, however,

[12] H.R. Rep. No. 1497, *supra*, at 10; Hearings on H.R. 5012, *et al.* (Government: Federal Public Records Law), before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., p. 29 (1965); 112 Cong. Rec. 13659 (1966); *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.), reversed on other grounds, 484 F. 2d 1086 (C.A.D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

does not except that material from the coverage of exemption 2.

The "potential for public interest" exception which the court of appeals (Pet. App. A, p. 8A) has grafted onto exemption 2 largely undermines the exemption and severely limits the confidentiality of agency documents Congress intended to protect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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